No. 14,553

United States Court of Appeals

For the Ninth Circuit

NEVADA-PACIFIC DEVELOPMENT CORPORATION, V. E. WILLEY, G. F. STURDEVANT, C. FITCH, L. A. PRISK, BILL GREGORY, D. HULBERT and GEORGE N. TAUSAN,

Appellants,

vs.

HARLEY W. GUSTIN,

Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

REPLY BRIEF OF APPELLANTS.

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STATEMENT OF THE CASE.

Contrary to the assertions made by appellee in his Statement of the Case, to the effect that appellants have avoided the factual premise of the judgment appealed from, our opening brief is replete with pointed recitals of the identical question posed by appellee, and as connoted by that judgment.

The primary issue, lack of a valid discovery on any of the disputed Kay Cooper locations, is repeatedly stressed: first, as the fundamental question

in our Statement of the Case (Op. Br. pp. 5 and 7); next in the 2nd, 3rd, 4th, 7th and 11th Specifications of Errors (Op. Br. pp. 8, 9, 10 and 12); again in the Summary of Argument (Op. Br. pp. 12, 13 and 14); and recurrently throughout the Argument in reviewing the evidence of appellee's witnesses (Op. Br. pp. 14-29).

THE QUESTIONS INVOLVED.

Admittedly, one primary question is presented for review: that of discovery, or the lack of it on each of appellee's disputed locations. Determination of that question essentially involves, however, the consideration of three elements: (1) sufficiency of the evidence to support the findings; (2) whether the findings are contrary to the clear weight of the evidence; and (3) whether the trial Court's conclusion on the evidence has been arrived at by a wrong conclusion of law.

ARGUMENT.

(a) LACK OF DISCOVERY ON KAY COOPER LOCATIONS.

The quoted excerpts from testimony given by appellee's witnesses R. C. Peterson, Carl Harry Cooper and Albert Brown (Ans. Br. pp. 3-7) add nothing to counteract appellee's failure to prove valid discoveries on the Kay Cooper locations, already covered in appellants' opening brief (pp. 21-24).

Lamping the area with fluorescent lamps and finding outcroppings, unless followed by the exposure of

a vein or lode of mineralized rock in place, and not by the perfunctory excavation of a 240 cubic foot trench, do not fulfill the requirements, either Federal or State.

The mere finding of ore "in the location cuts," or "scheelite in the discovery cut," or "mineral in all of them" is too nebulous to be seriously considered, in the absence of positive evidence that those mineral showings were actually in a vein or lode in place.

The sum and substance of testimony furnished by Carl Harry Cooper is that he and his co-locator R. C. Peterson excavated 240 cubic feet "on each of those claims" (Op. Br. p. 22; Tr. p. 129).

R. C. Peterson also testified that he was assisted by Albert Brown after first describing the discovery work on Kay Cooper No. 1 as "a hole in the ground," which "measured over 240 cubic feet of ground removed." This witness stated that the work was done with pick and shovel "all run by hand;" that they used some powder but did no drilling (Tr. 183). The witness then testified that the "same identical procedure was followed on all claims" (Tr. 184).

As a miner and prospector of more than thirty years' experience, we may reasonably assume that this witness could have given positive testimony as to the discovery work performed on Kay Cooper Nos. 6, 8, 9 and 10 had the facts so warranted.

The character of the initial and merely token attempts of the locators to effectuate valid discoveries on the "Kay Cooper Nos. 6 to 11" is demonstrated by

the witness's description of the discovery work as "open cuts and such as that" (Tr. 185).

When J. L. Dougan acquired his option on the Kay Cooper property on September 8, 1949, R. C. Peterson was employed under Lee Dougan's supervision for about six weeks, until some time in October, 1949, "prospecting and running cut on the side hills" (Tr. 186-7). "We run a cut of considerable length and I would say about four feet in depth, using a jack hammer and powder" (Tr. 187).

Laboring under the same aura of vague uncertainty, and when asked to indicate on Plaintiff's Ex. 17 where the work was done, the witness first pointed to Kay Cooper No. 8, then indicated Kay Cooper No. 2, and upon being asked the direct question: "Did you work down in No. 8 at all?" answered: "I don't believe I did. The work was started after I left there." (Tr. 187-8).

On cross-examination this witness testified that he did not believe that all of the discovery holes "on the entire 11 claims" were in rock formation, and was unable to identify those that were. He stated: "There was mineral present in each hole," but could not state that there was mineralized rock in place in each hole (Tr. 190). On re-direct examination the witness stated that scheelite he found was in a granite formation, "more or less decomposed." (Tr. 194).

As noted in our opening brief (pp. 27-8) Albert Brown's testimony omitted to mention the Kay Cooper Nos. 6, 8, 9 and 10.

In the absence of evidence of a prior valid discovery by appellee's locators, Lee D. Dougan's opinion evidence that both claimants "were locating the same vein or lode" did not merit contradiction in the record. Mr. Dougan was not familiar with the discovery work on any of the Kay Cooper locations (Op. Br. 37; Tr. 400-1).

Except for an affirmative answer to the question: "Now in those trenches that you have testified to on Kay Cooper No. 8 and Kay Cooper No. 2, did you find ore in place?" (Tr. 397), Mr. Dougan furnished no further evidence of discovery. He was not asked, and volunteered no information as to such essential characteristics as to whether the "ore in place" was in a vein or lode of mineralized rock in place, contained within walls; or, of even greater importance, at what depth ore was exposed in the trenches.

Testimony that those trenches "figured out better than 240 feet," in accordance with Mr. Dougan's instructions (Tr. 401), is no evidence of compliance with the legal requirements for discovery, Federal or State. While doubtless intended to supplement the precedent and defective discovery work attempted by the co-locators Cooper and Peterson, there is a continuing absence of material evidence that those subsequent efforts effectively meet the requirements.

It is elementary that priority of discovery confers the prior right and that unless discovery has been timely accomplished formal acts of location confer no right of possession to the exclusion of one who enters

on the ground peacefully for the purpose of making a discovery (Op. Br. 41-43).

The inconsequential testimony of J. L. Dougan regarding his abortive expenditures of money, his "observation of tungsten and the occurrence of mineralization," as also the incomplete testimony of Joe Federhoff on his similarly abortive "drill holes" are sufficiently covered in our opening brief (18-21).

Appellee's geologist, Victor E. Peterson, testified on direct examination that he could not say that in some instances, whether or not the ore was in place, and stated:

> "Now that is true in the case of the ore in the vicinity of the Kay Cooper No. 8, where I cannot say definitely whether it is transported material or is the result of residual weathering, whereby it is possible to develop material of granular nature strictly through weathering, through no transportation, so as to say whether or not we found ore in place in some instances, I do not know for sure without further investigation." (Tr. 212).

Although Mr. Peterson essayed to testify as an expert mining witness, his technical training and major field activities appear to have been more directly concerned with civil engineering and oil geology. Mr. Peterson is the only witness who attempted to furnish specific evidence of discovery on the Kay Cooper locations, and appellee is bound by his doubts and misgivings as to whether, in some instances, the ore is in place, and particularly by his

negative testimony in relation to Kay Cooper No. 8 as quoted supra. It is clear from the modifying and frank admissions of this witness that he was not qualified to furnish positive and affirmative evidence on the discovery of a mineralized vein or lode of rock in place and at depth, as to any of the Kay Cooper locations "without further investigation." (Tr. 212).

The defective weaknesses already noted in Mr. Peterson's testimony are neither explained away or strengthened in his answer to the trial Court's unfinished question as to whether the presence of tungsten in the discovery cuts "would apply to all of the—(claims)."

In answer to that question the witness testified:

> "Of course, in the case of No. 8 there is definite showing on the rock, on the surface. In the case of No. 2 that is also true. On No. 4 it is pretty definitely in place. On No. 6 it is very definitely in place. In the claim which lies to the South, in what might be called reconsolidated matter, that is open to question." (Tr. 212-213).

Whether inadvertently or otherwise, throughout his testimony this witness made no statement indicating that either the "mineral in place" or the "showing on the rock" were disclosed in a vein or lode in place, or that such exposures were contained within clearly defined boundaries or walls separating them from the country or non-mineral rock.

The mass of the mountain may be, and frequently is, composed of granitic rock, but to constitute a vein

or lode it must be distinguishable from such mass, whether granitic rock, country rock or any other mass formation. For all that appears in evidence to the contrary, the granitic rock mentioned by Mr. Peterson may be either "rock of the mountain" or "country rock." R.S. 2320 does not contemplate that a valid location may be made of granitic rock any more than it may be made of rock of the mountain or country rock consisting of quartzite, limestone or other similar material, unless a vein or lode in place is first discovered in such granitic rock, and contained in well-defined walls. "Decomposed granite" and "microscopic amounts of scheelite occurring in this granitic rock", (Tr. 211-212) cannot be accepted as mineralized rock in place, unless shown conjunctively with a vein or lode. As we have stated, the existence of a vein or lode is nowhere mentioned by this witness.

Indications of mineralization over a wide area, and not specifically identified as within the boundaries of a designated mining location, fall far short of establishing a valid discovery on any attempted location sought to be protected by such blanket efforts.

We respectfully reiterate that such showings, whether on the surface or below the surface, in the absence of testimony that the mineralized rock was contained in a lode or vein in place, do not meet the requirements for discovery of a mineralized vein or lode under Federal law, or for the discovery of "a lode deposit of mineral in place" under Nevada law (Op. Br. p. 28).

It is quite evident that the limited time spent on the property examining not only the original Kay Cooper group of eleven locations, but also the whole adjacent area was insufficient to enable Mr. Peterson to give positive testimony on the material question of whether a vein or lode in place was actually discovered on any of the Kay Cooper locations now in controversy. As a geologist and surveyor, Mr. Peterson's professional interest and activities were devoted to exploring the economic possibilities of the entire area rather than in concentrated attention on the mineral characteristics of the discovery work on any particular claim. Furthermore, Victor E. Peterson's expert testimony must be considered with the layman testimony of one of the locators, R. C. Peterson, in relation to Kay Cooper Nos. 6 to 11, that "he couldn't say for sure" whether there was a mineralized vein in each discovery hole (Tr. 190-1), and that of the co-locator Carl H. Cooper.

Mr. Cooper testified on direct that he did the location work on the Kay Cooper Nos. 6 to 11 and that he found ore in each of the 240-cubic foot open cuts (Tr. 129), but on cross-examination stated that R. C. Peterson and Albert Brown did the actual work (Tr. 165); "I may have helped, I don't remember exactly." (Tr. 166).

The evidence presented by appellee's supporting witnesses on the question of discovery falls short of meeting, or even approximating, the essential elements noted in any of the controlling decisions definitive of what constitutes a vein or lode of mineralized rock in place. Nor does such evidence of discovery

substantially conform with the express provisions of the Nevada statute (Sec. 4120, N.C.L. 1941 and Sec. 4122 N.C.L. 1929), or with the well-known custom of miners in the absence of such regulatory provisions.

"Minor amounts of scheelite occurring in this granitic rock," and ore composed of transported material, or resulting from residual weathering, mentioned by Mr. Peterson in explaining his lack of assurance that there is ore in place in the vicinity of Kay Cooper No. 8 (Tr. 212), cannot be regarded under any of those hypotheses as indications of a discovery in a vein or lode.

The essential characteristics of a "vein or lode" as contemplated by Federal law, are defined in the authorities cited in our opening brief (pp. 39-41, 45-46), to which may be added:

> "A deposit of calcium phosphate lying in veins or beds of various thickness, having a dip and strike, between solid and clearly defined walls of limestone, is a vein or lode of rock in place within the meaning of Rev. St. sec. 2320, and subject to entry thereunder only as a lode claim."
>
> *Duffield v. San Francisco Chemical Co.,* 205 F. 480, 123 C.C.A. 548.

> "'Lode' as the term is used in mining law, means a fissure between well-defined boundaries, containing ore, even though the ore is found at considerable intervals and in small quantities."
>
> *U. S. v. King,* 9 Mont. 751, 22 Pac. 499.

> "'Vein' or 'lode' is mineral-bearing rock or other earthy matter in place in a fissure in rock,

so that its boundaries are sharply defined by rock walls in place."

Webb v. American Asphaltum Min. Co., Colo., 157 F. 203, 84 C.C.A. 651.

"A lead or lode is not an imaginary line without dimensions; it is not a thing without shape or form; before it can legally and rightfully be denominated a 'lead' or 'lode' it must have length and width and depth. It must be capable of measurement, and must occupy definite space, and be capable of identification; and before a lode can be called a 'discovery' at least one well-defined wall or side of the lode must be found."

Foote v. National Min. Co., 2 Mont. 402, 404.

Mr. Justice Field, in the Nevada case of *Eureka Cons. Mining Co. v. Richmond Mining Co.* (8 Fed. Cas. 819), defines a lode to be "a zone or belt of mineralized rock and lying within boundaries clearly separating it from the neighboring rock."

Excepting for the "showing on the rock, on the surface" on Kay Cooper No. 8, there is no evidence anywhere in the record to indicate at what depth "in the discovery cuts" mineralized ore was encountered, in place or otherwise.

In order to meet the Nevada requirements for discovery, mineralized showings on the surface must be developed by exploration at depth, either by sinking a shaft or by any one of the prescribed equivalent alternatives (Op. Br. pp. 43-45).

The words "in place," as applied to mineralized rock within the purview of Federal law (R.S. 2320),

and Nevada law (sec. 4120, N.C.L. 1941 Supp.) means "in situ," i.e. mineralized rock contained in a vein or lode, as distinguished from placer or other deposits.

R.S. 2320 (Op. Br. p. 15) authorizes the location of mining claims "upon veins or lodes of quartz or other rock in place bearing gold . . . or other valuable deposits" upon discovery of "the vein or lode" within the limits of the claim located.

> "The phrase 'in place' as used in Act of Congress, May 10, 1872, in relation to mining claims, in speaking of veins or lodes of quartz or other rock in place indicates the body of the country which has not been affected by the action of the elements, which may remain in its original state and condition, as distinguished from the superficial mass which may lie above it."
>
> *Stevens v. Williams,* 23 Fed. Cas. 44.

Sec. 4120 of the Nevada law likewise authorizes a qualified locator "who discovers a vein or lode" to locate a mining claim thereon. Sec. 4121 N.C.L. 1929 (Op. Br. pp. 15-16) prescribes that within ninety days after posting his location notice the locator must sink a discovery shaft, or its equivalent, of sufficient depth to show by such work "a lode deposit of mineral in place."

> "No valid location of a mining claim can be made until a vein, or deposit, of gold, silver, or metalliferous ore, or rock in place has been discovered."
>
> *Overman S. Min. Co. v. Corcoran,* 15 Nev. 147, 1 Morr. Minn. Rep. 691.

Perfection of the inchoate right initiated by prior posting of a location notice, followed by monumenting and marking boundaries, is dependent upon completion of a valid discovery in consonance with Federal and State laws. Failure to comply voids the location and renders the ground open to relocation by others.

> "A failure to comply with the laws and regulations in force in the district, whether national, state or local, works a forfeiture of the claim, whether such laws or regulations so provide or not, and the same becomes subject to location by any qualified locator."
>
> *Sisson v. Sommers,* 24 Nev. 379.

(b) CONFLICT IN TESTIMONY AND TRIAL COURT'S FINDINGS.

In commenting on appellants' interest in the property, counsel refers to defendant Hulbert's demand on Cooper on June 29, 1950 for a one-half interest in the anticipated funds to be derived from the J. L. Dougan option. The fact is, of course, that long before the attempted entry of appellee's grantors Hulbert, Gregory & Rutter, preceded by Hulbert's father-in-law (Ray Ricketts), had expended time and money on the lands embraced in what are now known as the "Ray Ricketts" claims for upwards of twenty years (Tr. 276-279).

Appellee's witness, Victor E. Peterson, first appraised the Kay Cooper locations for the locators, R. C. Peterson and Carl Cooper, in July, 1949, for the immediate purpose of helping them sell "to some client" (Tr. 198), and due to his enthusiasm for the area, J. L. Dougan became interested in the area and

acquired his option from R. C. Peterson and Carl Cooper (Tr. 200-201).

Acting in the mistaken belief that his 1947 locations of the Ray Ricketts group were valid, and in ignorance of Nevada's 1941 amendment, Hulbert was willing to compromise and avoid a conflict (Tr. 304-5, 323, 238-239, 240-1).

In passing, it may be noted that appellants' grantors were the original locators of the lands in dispute under their 1947 locations, which were voided for non-compliance with the 1941 amendment.

Except for such forfeiture, appellee's relocation of the conflicting areas would not have been possible.

Appellee is in no position to complain against a strict application of the law on discovery. Except for appellants' failure to comply with the 1941 statute, appellee's grantors could not have located their Kay Cooper claims, and having taken advantage of appellants' technical omission to record certificates of location appellee should not now complain that substantial compliance is invoked against him on a similar major defect. Appellee is not the senior discoverer, although technically a senior locator. The 1947 locations of appellants' grantors were never abandoned, annual labor requirements having been performed faithfully for many successive years and forfeiture of those locations resulted only from failure of compliance with the recordation statutes (Deft's Ex. F, Tr. 268-270).

Appellants' views on the findings, as expressed in the opening brief (48-51) contain nothing to indicate,

either succinctly or inferentially, that they are predicated upon the theory that "the trial judge believed the wrong witnesses." (Ans. Br. p. 8).

In the case at bar, validation of contested mineral discoveries is not accomplished by the sufficiency of evidence, the clear weight of evidence, or a construction of the applicable law, if the third element mentioned does not coincide with either the first or second of those essential elements.

The question of credibility is of minor importance where, as here, no witness is shown to have testified falsely, all witnesses may be considered as testifying according to their lights and their opportunities for observation.

Appellants' authorities on the meaning of mineral in place are accepted by appellee.

Appellants agree that the next point in issue is not a refinement of definition of what constitutes a discovery, but whether a genuine discovery has been made. Unless it be genuine, i.e. valid in fact and law, it is no discovery.

The case of *Ambergris M. Co. v. Day* (12 Ida. 108, 85 Pac. 109) cited by appellee with quoted excerpts from the Court's opinion (Ans. Br. 11), might be somewhat in point if the Appellate Court's decision had been in favor of the senior locator as inferred by counsel.

In that case, the senior location of the "Anna" lode claims was made on August 19, 1901, and a junior location of the conflicting "Hercules" claims was made on October 4, 1901. The reviewing Court re-

versed the lower Court's judgment for the senior location and ordered a new trial (at p. 114).

Wheeler v. Holland (C.C.A. 5, 218 F. 2d 482), cited by counsel (Ans. Br. 12) is a case brought by a taxpayer against the Director of Internal Revenue to set aside tax assessments, quash distraint warrant and for similar relief, based upon alleged fraud and duress. The findings of the District Court adverse to the taxpayer's contentions were sustained by the Court of Appeals as "supported by the evidence and not clearly erroneous." However, the trial Court in that case found that the taxpayer's contentions were "unfounded in law and in fact." No such questions of law and preponderance of evidence were presented by the appellants in that case as are predominant in the case at bar.

One may opine that if decisions supporting the trial Court's findings in such unrelated cases as the *Wheeler* case were accepted as controlling in mining disputes involving questions of discovery and the like, conflicting claims to mineral lands would seldom be reviewed on appeal.

In *U. S. v. Yellow Cab Co.* (338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150), also cited by appellants (Op. Br. 50) and also by appellee (Ans. Br. 8), in recognizing the duty of the Appellate Court "to correct clear error, even in findings of fact," the Supreme Court was called upon to consider only questions of fact, and not questions of both fact and law.

The case of *Gamewell Co. v. City of Phoenix* (C. C.A. 9th, 216 F. 2d 928) cited by counsel (Ans. Br.

7, 8) is an action by the plaintiff company to recover on a contract for the installation of a fire alarm system for the defendant city. The judgment of the lower Court was affirmed in part, on questions of fact, and reversed in part on questions of law.

"The effect of findings" under Rule 52a is considered by this Honorable Court (at p. 931). After stating that the findings stand before the Court with the presumption of validity, unless they are clearly erroneous, the Court said:

> "Of course, if an erroneous legal conclusion is drawn by a trier of fact, it will be set aside."

Exceptions reserved in Rule 52(a) are so well recognized as to require no citations additional to those noted in appellants' opening brief (50-1) and those discussed supra.

Where the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been committed, or where the findings are contrary to the clear weight of the evidence or where the trial Court's conclusion has been arrived at by a wrong conclusion of law, the reviewing Court will not hesitate to rectify the error.

Appellants concede that quality or quantity of mineralization are unimportant if all essential elements for a discovery are established (Ans. Br. 10). To that limited extent the Nevada case of *Fox v. Myers* (29 Nev. 169, 86 P. 793) is in point. Having been decided in 1906, the liberal views enunciated in that case are no longer applicable, when considered in light of Nevada's existing regulatory statutes.

Although critical of the policy of Nevada's 1941 amendment to section 4122 N.C.L. as "a severe and confusing, but unfortunately legal, prerequisite to the location of a lode mining claim" (Tr. 42) the trial Court reluctantly recognized its compulsory effect (Tr. 41), and cited with approval Mr. Justice Beatty's decision in *Gleeson v. Martin White Min. Co.* (13 Nev. 442, 459).

The basic reasoning in the *Gleeson* case, construing the beneficial effects of R.S. 2320, to the effect that where the plain terms of a statute have no room for construction, the statute must be strictly followed, applies with equal force to Nevada's amended statutes of 1907 (Secs. 4120 N.C.L. 1941 Supp. and 4121 N.C.L. 1929). As argued in our opening brief (pp. 15-16, 43-45), those regulatory laws were enacted for the same laudable purpose of curing existing ills in Nevada's former law on the subject.

All parties agree with the trial Court's holding that the mandate of the 1941 statute (sec. 4122) is expressed in plain and unambiguous terms (Tr. 41), and appellants invoke the same recognition for the mandate of sec. 4121 N.C.L. 1929, requiring that one who locates under sec. 4120 must perform sufficient discovery work to expose a lode or vein of mineral in place, and at depth.

A considerable portion of the trial Court's opinion is devoted to establishing the invalidity of all of appellants' 1947 Ray Ricketts Nos. 1 to 4 locations, and like invalidity of appellee's Kay Cooper locations

Nos. 1 to 5, because of non-compliance with sec. 4122 (Tr. 39-43).

Excepting only as to appellants' 1951 Ray Ricketts No. 3 location, which is also justly voided, the trial Court's opinion and findings are silent on the all important question of discovery as applied to the disputed Kay Cooper locations.

Aside from pro forma findings that appellee's Kay Cooper Nos. 6 to 11 were located "in full compliance with the laws of the United States and of the State of Nevada on public lands of the United States then subject to such location of mining claims" (Finding No. 5, Tr. 47), and "have each been maintained in full compliance" with said laws (Finding No. 8, Tr. 48), there is nothing in the findings to indicate that the trial Court actually found from the evidence that discovery had been accomplished on any of the Kay Cooper locations.

The trial Court also found that appellants' 1951 locations of Ray Ricketts Nos. 1 and 4 were made "in full compliance with the laws of the United States and of the State of Nevada" (Finding No. 15, Tr. 50).

As to appellants' 1947 and 1951 locations of the Ray Ricketts No. 2 claim, the trial Court expressly found that there was no valid discovery (Finding No. 16, Tr. 50-1), and the trial Court's adverse finding in that regard is assigned as error (Tr. 404, 405). As to appellants' 1947 and 1951 Ray Ricketts No. 3 attempted location, the trial Court also expressly

and correctly found that there was no discovery (Finding No. 17, Tr. 51).

In rightfully invalidating appellants' Ray Ricketts No. 3 location, the trial Court quoted at length from the damaging testimony frankly presented by the co-locator Hulbert in admitting, on direct examination, that even after supplementing his initial efforts with a bull dozer he never struck a lode, "only sand." (Tr. 44).

Measured by the same standards for the exposure of a qualifying lode or vein in place, and even if the testimony of appellee's witnesses were accepted at face value, none of the conflicting Kay Cooper locations meet the requirements of either R.S. 2320 or Sec. 4121 N.C.L. 1929. On the other hand, appellants' supporting evidence of valid discoveries on Ray Ricketts Nos. 1, 2 and 4 stands uncontradicted in the record.

CONCLUSION.

For the reasons presented, appellants urge that the judgment appealed from be reversed.

Dated, Reno, Nevada,
April 18, 1955.

Respectfully submitted,
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Of Counsel for Defendants (Appellants).